



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

MISC. CIVIL APPLICATION NO. 23 OF 2017

REBECCA C. SOY.....APPLICANT

VERSUS

HARRISON ALUDA.....1ST RESPONDENT

ALBINA ALUDA.....2ND RESPONDENT

RULING

The application before court is dated 10.10.2017. It seeks orders that this honourable court allows the applicant to file appeal out of time and that the applicant be allowed to file pleadings for purposes of appeal. The application is based on grounds that judgment was issued in this case on 14th July, 2017 against the applicant and that on 18th July, 2017 a letter was addressed to the Chief Magistrate requesting for certificate copies of proceedings and judgment and that it took long preparing and supplying certified copies of proceedings and judgment from the time judgment was delivered.

When the applicant appeared at the registry to inquire on the progress of typed proceedings and judgment, they were informed that the bill of cost had been filed and had been taken for taxation and the applicants were never served. This also caused a further delay in typing proceedings and judgment. That despite several efforts made by the applicant to have typed and certified proceeding and judgment on time for purpose of filing an appeal, there has been continuous delay at the court's typing pool leading to the delay in appeal. According to the applicant, the certified copies of proceedings and judgment were issued on 12th September, 2017 when they were ready. That the delay in typing the proceedings and judgment was not been occasioned by the applicant. This order is necessary in order to ensure that the applicant enjoys her right to appeal as anchored in law. That it will be just and fair if the orders sought in this application are granted.

The application is supported by the affidavit of Kibichiy Ngala who states that judgment in this case was made on 14th July, 2017 and was in favour of the defendant. That on 18th July, 2017, they drafted a letter addressed to Chief Magistrate requesting for certified copies of proceedings and judgment which was filed on the same day. That it took the court a long time preparing and supplying them with certified and typed copies of proceedings and judgment and that the delay was caused by the large number of files at the typing pool that were also awaiting typing.

When the applicant through counsel appeared at the registry to inquire on the progress of the typed proceedings and judgment, they were informed that a Bill of Cost has been filed by the defendant and had been taken for taxation. This further contributed to the delay in typing at the typing pool. That despite their several efforts to have typed proceedings and judgment so that they can lodge their appeal on time, their efforts were frustrated by the continuous delay of the typing at the court's typing pool. The applicant

reiterates that certified typed copies of proceedings and judgment were finally issued on 12th September, 2017.

The applicant believes that the delay in filing this application is excusable as there are valid reasons why the appellant did not act on time. They urge the court to accept the reasons given herein above and allow the application and that the orders prayed are necessary in order to ensure that the applicant enjoys his right of appeal. That it will be just and fair if the orders sought in the application are granted.

In reply, Mr. Harrison Aluda states that the application has not been brought in good faith as the facts are not true and that the applicant does not deserve the orders as the reasons for the delay have not been given. Moreover, that the certified copies of proceedings and judgment were issued on 12.9.2017 but the applicant prepared and filed the application on 10.10.2017 and that is inordinate and inexcusable delay. Judgment was delivered on 14.7.2017 in the presence of both parties and that it has taken the applicant 3 months to file the application from the date of judgment and one month from the date the proceedings and judgment were received. Lastly, the respondent states that the appeal does not raise sufficient grounds and that the matter in the lower court was raised on a point of law.

M/s Sitati learned counsel for the applicant submits that judgment was delivered on 14.7.2017. the appeal was not filed within 30 days because they received the proceedings and judgment on 12.9.2017 and therefore had to take some time to get further instructions from their client. According to Sitati, the lower court case was based on recovery of land. The limitation period for recovery of land is 12 years and therefore, time had not lapsed when the suit was filed. Judgment was delivered on 14.7.2017 and the letter for proceedings and judgment was written on 17.7.2017. On the judgment date, the advocate who held brief did not remember to apply for judgment and proceedings orally. Lastly, that the sickness of the client affected them.

Mr. Okara learned counsel for the respondent, submits that Judgment was delivered on 14.7.2017 in the presence of both parties and counsel. No oral application for proceedings was made in court. The proceedings were not needed to lodge a memo of appeal. Memorandum of Appeal can be lodged and proceedings obtained subsequently. No evidence of medication has been availed to demonstrate that the applicant was unwell. Moreover, we are not told when a copy of judgment was obtained. There is nothing on record to show that proceedings were received on 12.9.2017. The applicant is blaming the lower court in failing to supply proceedings in good time but there is no certificate of delay. There is no evidence that the applicant was in communication with the lower court. The only letter attached is the one for proceedings. The suit at the lower court was based on a contract and therefore the lower court properly held that the suit was filed out of time and that the contract had lapsed. The appeal has no chances of success.

I have considered the application, supporting affidavit of Rebecca c Soy and the replying affidavit of Harizon Aluda and rival submissions and do find that the gist of the applicant's application is that this court exercises its discretion by allowing the applicant to file appeal out of time and that the applicant be allowed to file pleadings for purposes of appeal. The power to extend time is granted by section **79G Of the Civil Procedure Act Cap 21 Laws of Kenya**. The section provides for the Time for filing appeals from subordinate courts thus that every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

The power of the court to grant leave to file an appeal out of time under section 79G is discretionary and the same ought to be exercised judiciously and not whimsically as the applicant has to show sufficient cause as opposed to reasonable cause. The principles that guide this court in considering an application for leave to file an appeal out of time were laid down by the Court of Appeal in the Case of **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015) eKLR** thus:-

“The principles guiding the court on an application for extension of time premised upon *Rule 4 of the Rules* are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favor.”

The parameters for the exercise of such discretion are clear. See MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486 and FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332 OF 2004 (unreported) where the court of appeal rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In MWANGI V KENYA AIRWAYS LTD, the court having set out matters which a single judge should take into account when exercising the discretion under *Rule 4*, held:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondent.

This was well stated in the case M/S PORTREITZ MATERNITY V JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997 where the Court stated:

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favor. There have been numerous judicial pronouncements on this precise point. Aganyanya, J A in MONICA MALEL & ANOR V R, ELDORET CIVIL APPLN NO. NAI 246 OF 2008, stated:

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

It should not be supposed that the discretion is entirely unfettered as Lord Romilly MR explained in HAYWOOD V COPE, (1858) 25 BEAV 140:

“... the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be

done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So, the person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so.”

The applicant herein has not demonstrated that there is a decree or order in this matter and therefore the court is unable to discern when the decree was made and issued. The applicant does not assist this court at all to enable it discern the period for the preparation of the decree and therefore the delay. The applicant has not annexed the certificate of delay in compliance with section 79 G of the Civil Procedure Act.

The only avenue left for the applicant is the proviso to section 79G whose import is that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time. The applicant states that the delay was due to the fact that it took the court a long time preparing and supplying them with certified and typed copies of proceedings and judgment and that the delay was caused by the large number of files at the typing pool that were also awaiting typing. This reason is not viable as there is no indication that the applicant made any follow up to the letter dated 17th July 2017 and that there was no effort at all to draw the decree for purposes of appeal. The filing of the application herein more than 25 days after the typed proceedings and judgment were obtained does not demonstrate that the applicant was desirous to move with speed and file the appeal as no good reason has been given for the delay between the 12th of September 2017 and the filing of the application on 10th October 2017. There has to be valid and clear reasons, upon which discretion can be favorably exercised. Ultimately, I do find the application without merit and the same is dismissed with costs.

Dated and delivered at Eldoret this 20th day of November, 2017.

A. OMBWAYO

JUDGE